UNITED STATES OF AMERICA
DISTRICT OF MAINE

JOHN E. LAVIN,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 01-135-P-C
	)	
PATRICIA TREZZA, et al.	)	
	)	
Defendants	)	

RECOMMENDED DECISION ON DEFENDANTS' MOTION TO DISMISS

Plaintiff John E. Lavin has sued his former employer and a number of former co-employees as a result of events culminating in the termination of his employment. This matter is now before the court on a single motion by all four defendants, Patricia Trezza, Lisa Parechanian, Robyn Merrill, and UnumProvident Corporation (Unum), seeking dismissal of portions of the complaint. (Docket No. 14.) I recommend that the court **GRANT** the pending motion as to the three individual defendants. However, the defamation count against Unum survives because even though Unum has moved to dismiss asserting that it is entitled to a conditional privilege as a matter of law, there remain factual allegations as to whether Unum abused that privilege.

FACTUAL ALLEGATIONS

John Lavin has filed a pro se complaint tendering five separate counts alleging defamation, wrongful termination, violations of the Americans with Disabilities Act, "unlawful taking and fraudulent behavior," "failure to provide compensation," and "malicious and gross negligent defamation." He also includes a claim for punitive

damages. The defendants are his former employer, Unum, Patricia Trezza, a former co-employee of Lavin's, and Lisa Parechanian and Robyn Merrill, Lavin's former supervisors. He has also sued "several other as yet unknown employees" of Unum.

According to the complaint, Trezza and "several as yet unknown employees" accused Lavin, a former employee of Unum in Portland, Maine, of making "inappropriate looks, glances or staring at the bodies of other employees or engaging in these or other inappropriate behavior or conduct." (Compl. ¶¶ 6, 7.) As a result of Trezza's (and others) internal complaints Lavin was terminated from his employment. (Compl. ¶¶ 8,12, 13.) Lavin suffers from a disabling medical condition necessitating medications that "caused him to seem at times to be staring at persons or objects." (Compl. ¶¶ 9, 10.) Unum was specifically aware of the medical condition. (Compl. ¶ 10.)

Parechanian, an employee of Unum acting through the Human Resources Department, was obligated to conduct a "prompt, impartial and thorough investigation when allegations or complaints of harassment or sexual harassment" arise in the workplace. (Compl. ¶¶ 17, 18.) Parechanian did not conduct that impartial investigation in accordance with the procedures set forth in Unum's Human Resources Policy. (Compl. ¶ 19.) Specifically her investigation failed to disclose that Lavin suffered from a disabling medical condition that required his employer to make certain unspecified reasonable accommodations "to prevent [him] from seemingly conducting himself in a manor [sic] that was inappropriate." (Compl. ¶ 19.) As a result of Parechanian's failure to follow the applicable policy guidelines, Lavin was terminated in a "wrongful and malicious manner." (Compl. ¶ 20.)

During this time period Lavin met with Merrill, a supervisor at Unum, and asked for accommodation for his disability. Merrill not only refused to provide any reasonable accommodation, but she actually increased Lavin's work requirements, exacerbating his physical and emotional distress. (Compl. ¶ 23.) She also refused to permit Lavin to schedule earned vacation time resulting ultimately in Lavin forfeiting one week of paid vacation leave at the time of his termination. (Compl. ¶ 24.) The "paid" vacation leave had accumulated as a result of a salary withholding plan Unum offered to employees which enabled them to "buy" up to one week of vacation time a year. (Compl. ¶ 24.) Merrill permitted other employees who had "paid" for vacation leave to take their leave, while denying Lavin that opportunity. (Compl. ¶ 25.)

When Lavin was terminated on March 2, 2000, Parechanian and a representative of Unum's human resource department told him that the reason for the termination was considered confidential and would not be published by Unum unless Lavin so authorized. (Compl. ¶ 30.) Lavin never used any Unum personnel as references when applying for any positions following his termination and never authorized Unum to publish the reason for his termination. (Compl. ¶ 28.) However, an unnamed potential employer who had extended a written job offer to Lavin, informed Lavin that he had learned of the circumstances surrounding his termination from "persons employed at UnumProvident Corporations." (Compl. ¶ 32; see also id. ¶ 33.) The Unum source specifically indicated to this potential employer that Lavin had been terminated because of "sexual harassment." (Compl. ¶ 32.) The potential employer refused to tell Lavin who at Unum had disclosed this information. (Compl. ¶ 33.)

Finally, Lavin alleges that all of the defendants acted with malice and that he is entitled to recover punitive damages. (Compl. ¶¶ 34, 37, 38.)

RULE 12(b)(6) STANDARD

When considering a Rule 12(b)(6) motion to dismiss, the Court must accept as true the well-pleaded factual allegations of the complaint, draw all reasonable inferences in the claimant's favor, and determine whether the complaint, when viewed in the light most favorable to the claimant, sets forth sufficient facts to support the challenged claims. Clorox Co. v. Proctor & Gamble Commer. Co., 228 F.3d 24, 30 (1st Cir. 2000); LaChapelle v. Berkshire Life Ins. Co., 142 F.3d 507, 508 (1st Cir. 1998.) All facts are construed in the light most favorable to plaintiff, although the Court need not credit conclusory allegations or indulge unreasonably attenuated inferences. See Aybar v. Crispin-Reyes, 118 F.3d 10, 13 (1st Cir. 1997); Ticketmaster-NY, Inc. v. Alioto, 26 F.3d 201, 203 (1st Cir. 1994.) At this threshold stage I do review the pro se complaint according to a "less stringent" standard than I would apply to a lawyer-drafted complaint. Haines v. Kerner, 404 U.S. 519, 520 (1972).

DISCUSSION

The five counts of Lavin's complaint are captioned thusly: Count I, Defamation Based on False Statements and Reckless Conduct; Count II, Wrongful and Malicious Termination; Count III, Failure to Provide Accommodation and Failure to Provide Compensation and Unlawful Taking and Fraudulent Behavior; Count IV, Malicious and Gross Negligent Defamation; and Count V, Punitive Damages. The individual defendants, Trezza, Merrill, and Parechanian, have moved to dismiss the claims against them for a variety of reasons. Unum has moved to dismiss Count IV, the defamation

count, because the alleged defamatory reference was true and Unum has statutory immunity from suit in a situation where it is alleged that it disclosed information about a former employee's job performance to a prospective employer. I will discuss each defendant's motion separately, as the issues raised differ significantly.

A. Defamation Claim Relating to Trezza

Trezza is named as a defendant only in Count I, a count seeking damages for alleged defamation. To state a claim for defamation under Maine law Lavin must allege: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting to at least negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." Veilleux v. National Broadcasting Co., 206 F.3d 92, 107 (1st Cir. 2000) (citing Lester v. Powers, 596 A.2d 65, 69 (Me.1991)); see also Cole v. Chandler, 2000 ME 104, ¶ 5, 752 A.2d 1189, 1193; Lester v. Powers, 596 A.2d 65, 69 (Me.1991). With respect to the first prong, "[u]nder Maine law, a statement is defamatory 'if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'" Veilleux, 206 F.3d at 107-08 (quoting Bakal v. Weare, 583 A.2d 1028, 1029 (Me.1990)).

Lavin alleges that Trezza, a fellow employee at Unum, accused him of "inappropriate looks, glances or staring at the bodies of other employees." He does not claim that her allegation was false. Indeed, he asserts that he "was taking medications that caused him to seem at times to be staring at persons or objects." While Lavin alleges

that Unum knew he was taking these medications, he does not allege that Trezza had any such knowledge.

First and foremost an allegedly defamatory statement must be false. See Faigin v. Kelly, 184 F.3d 67, 76 (1st Cir. 1999) (jury interrogatory concluding that the alleged defamatory statements were not false mooted other claims challenging the verdict on appeal); McCullough v. Visiting Nurse Serv. S.. Me., Inc., 1997 ME 55, ¶¶ 9-10, 691 A.2d 1201, 1204 (concluding that the plaintiff had not satisfied the falsity element of a defamation claim, observing that slight inaccuracies are immaterial if the statement is true in substance). Lavin's complaint clearly establishes that Trezza's statement was not only literally true, (Compl. ¶ 10, 19)[1] but that Trezza did not act maliciously or with reckless disregard of any attendant circumstances. Lavin does not claim that Trezza had any role in the termination decision, he does not claim that her statements were published beyond the context of complaint to management, nor does he assert that Trezza acted out of any personal animus directed toward him. He does not state a defamation claim against Trezza.[2]

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[1] I agree with the defendants that to the extent that Trezza interpreted Lavin's staring to be focused on certain parts of her anatomy, the extrapolation is an interpretation of the undisputed fact that Lavin was staring at Trezza. As such it is not actionable under Maine law. See Fortier v. Int'l Bhd. of Elec. Workers, Local 2327, 605 A.2d 79, 80 (Me. 1992) ("To be actionable the statement must contain a false statement of fact rather than an opinion, or contain the implication that the opinion is based on undisclosed defamatory facts. A statement is not actionable if it is clear the maker did not intend to state an objective fact but rather to present an interpretation of the facts.") (citation omitted).

[2] As Trezza indicates the complaint against her also likely fails on other grounds as well. Under the exclusivity provision of the Worker's Compensation Act, 39-A M.R.S.A. § 104, any of the damage claims seeking recovery for personal injuries suffered at work, including emotional distress, are subject to dismissal, leaving only economic damage claims. Cole, 2000 ME 104, ¶¶ 9-16, 752 A.2d at 1194-97. Furthermore, even if the complaint did allege that the statement was false, the circumstances strongly support the claim that Trezza had a conditional privilege to publish the allegation and in order to overcome that privilege Lavin would have had to allege that she published the statement outside of normal channels or with malicious intent, with knowledge that they were false, or with reckless disregard for the truth or falsity of the statement. Id., at ¶ 7, 752 A.2d at 1194; Gautschi v. Maisel, 565 A.2d 1009, 1011 (Me. 1989); accord Smith V. Heritage Salmon, Inc., __ F.Supp.2d. ___, 2002 WL _____ (D. Me. Jan. 14, 2002).

B. Claims Against Lisa Parechanian

In Count II of his complaint Lavin asserts claims against Lisa Parechanian for wrongful termination in violation of both the Americans with Disabilities Act ("ADA") and Unum's Human Resource Policy. Although Parechanian does not raise this issue, I interpret Lavin's complaint as alleging that the Unum's Human Resource Policy contains a contractual understanding between himself and his employer and that his termination was in violation of that contract. Under Maine law there are instances when a written policy or handbook can operate to modify the term of an at-will employee's contract of employment. See, e.g., McCullough, 691 A.2d at 1203 (discussing but dismissing former at-will employee's argument that an employee handbook created a definite term of employment).

Assuming, arguendo, that Lavin's complaint asserts such a claim, it does not provide a basis for personal liability against Parechanian. If Lavin had a contract of employment that provided Unum could not terminate him pursuant to the Human Resources Policy without taking certain enumerated steps, the contract was between Unum and Lavin. Parechanian is not alleged to have been a party to that contract. In fact the allegations recite that her activities were undertaken entirely in her capacity as an agent for Unum. Thus if Lavin is claiming that he was wrongfully terminated from his employment contract, the responsible party would have to be his employer, Unum. He has no common law wrongful termination claim against Parechanian.

Lavin's complaint against Parechanian under the ADA is equally deficient. This Court has followed the majority of federal courts in holding that individual supervisors are not subject to personal liability under the ADA. Gough v. Eastern Maine

Development Corp., 172 F.Supp.2d 221, 224-25 (D. Me. 2001) (collecting and following cases from every circuit save the First holding that there is only respondeat superior liability of the employer, no supervisor liability, in actions under Title VII, the Age Discrimination in Employment Act, and the ADA); see also Quiron v. L.N. Violette Co., Inc., 897 F. Supp. 18, 19 –20 (D. Me.1999); Smith v. Me. Sch. Admin. Dist. No. 6, 2001 WL 68305, *3 (D. Me. 2001) (Cohen, Mag. J.). Lavin does not state an ADA claim against Parechanian.

C. Claims Against Robyn Merrill

Robyn Merrill, a supervisor at Unum, is named as a defendant in Count III of the complaint alleging that she violated the ADA by not providing Lavin with reasonable accommodation for his disability. He also asserts that Merrill is liable for an "unlawful taking" and other unspecified fraudulent behavior in regards to her failure to allow him to take certain vacation time that he had "paid for" pursuant to an employee benefit plan. The ADA claim fails for the same reason as the ADA claim against Parechanian fails.

The claim for "unlawful taking" is more difficult to analyze because the pleadings do not specify the entire nature of this vacation scheme. In their notice of removal defendants suggest that this vacation package is part of an "employee benefit plan" arising under the laws of the United States, presumably ERISA. That thought, however, is not developed in this motion to dismiss, so I am unable to ascertain the exact nature of this claim. However, it is clear from the allegations that whatever the details of the arrangement, it was part and parcel of Lavin's employment contract with Unum. Lavin does not allege that Merrill enriched herself at his expense, instead he asserts that Unum itself had "monies earned" as the result of Merrill's refusal to allow him to take this

vacation time that he says he had a contractual right to take. It is clear from Lavin's allegation that if Merrill breached a duty owed to him under this vacation pay scheme, she did so as the agent of her employer Unum. Whatever rights Lavin seeks to assert under this claim, they must be asserted against Unum or the Plan Administrator, if such an entity exists. Lavin does not allege that Merrill personally converted his property for her personal use. There is no claim under any contract or tort theory against Merrill personally. To the extent that Lavin intends this to be a constitutional challenge, Merrill is not a governmental actor, so no such takings claim would lie.

D. Claims Against Unum

1. Defamation

The defamation claim against Unum in Count IV differs significantly from the claim against Trezza. In this claim Lavin alleges that Unum's agents[3] improperly disclosed to a prospective employer that Lavin had been terminated because of allegations of sexual harassment. Unum contends that this statement, like the statements made about Lavin's staring by Trezza, is substantially true. In the alternative it argues that it is entitled to a common law conditional privilege in the context of employment termination. It also alleges that it has a statutory immunity from civil liability pursuant to 26 M.R.S.A. § 598 even if it did disclose information about Lavin's job performance or work record to a prospective employer. Unum is correct as a matter of law on both points. 26 M.R.S.A. § 598 (West Supp. 2001) (providing employer statutory immunity for disclosures of former employee's job performance and work record); Cole, 2000 ME 104, ¶ 7, 752 A.2d at 1194 (discussing common law conditional privilege); Gautschi v.

[3] Lavin states that he does not know who at Unum made disclosures to his prospective employer and that the prospective employer was not willing to reveal his sources.

Maisel, 565 A.2d 1009, 1011 (Me. 1989) (same); accord Smith V. Heritage Salmon, Inc., __ F.Supp.2d. ___, 2002 WL 43256, *12 (D. Me. Jan. 11, 2002).

I conclude that there is a distinction of significance between characterizing Lavin's conduct as "inappropriate staring" and "sexual harassment." Unum argues that the latter is just an interpretation of Lavin's conduct that therefore does not run afoul of Maine defamation law. Fortier v. Int'l Bhd. of Elec. Workers, Local 2327, 605 A.2d 79 (Me. 1992). In Fortier the Maine Law Court stated: "To be actionable the statement must contain a false statement of fact rather than an opinion, or contain the implication that the opinion is based on undisclosed defamatory facts. A statement is not actionable if it is clear the maker did not intend to state an objective fact but rather to present an interpretation of the facts." 605 A.2d at 80 (citation omitted). With respect to the alleged disclosure by Unum to the prospective employer I cannot conclude that an assertion that Lavin was fired for "sexual harassment" was not an effort to state an objective fact or did not carry an implication that it was based on some undisclosed defamatory facts.

Furthermore, the common law conditional privilege in the context of an employment termination is subject to a requirement that it not be abused by disclosures outside normal channels or made with malicious intent, with knowledge that they were false, or with reckless disregard for the truth or falsity of the statement. Cole, 2000 ME 104, ¶ 7, 752 A.2d at 1194; see also footnote 2. Likewise the statutory immunity is not absolute and is subject to a "good faith" requirement that abrogates the immunity if the disclosure of false or misleading information was not made with good faith. 26 M.R.S.A. § 598 (plaintiff can overcome presumption that employer acted in good faith by producing clear and convincing evidence of a lack of good faith). In the present

complaint Lavin claims that Unum knew he suffered from a disabling medical condition that gave rise to the fellow employees' allegations against him. His employer then wrongfully terminated him and promised that it would not reveal the circumstances to prospective employers. Under unexplained circumstances a prospective employer learned of the termination through an agent of Unum. Those allegations, taken as true for the purposes of this motion to dismiss, are sufficient to state a claim for defamation against Unum under the Rule 12(b)(6) standard.

2. Wrongful Termination

While the defendants argue persuasively that Lavin's wrongful termination claim cannot be maintained against Parechanian individually, they have provided no legal argument as to why this claim cannot survive as against Unum. Lavin clearly lodges his Count II allegations against Unum as well as Parechanian, as the defendants recognize in the preliminary statement to their motion to dismiss. It is not entirely clear from this count's references to the ADA whether this claim against Unum is intended as a state law claim or one that rises and falls on the ADA.[4] See Champagne v. Servistar Corp., 138 F.3d 7, 12-13 (1st Cir. 1998) (discussing an ADA wrongful termination claim); see also 5 M.R.S.A. §§ 4553, 4572 et seq. (Maine Human Rights Act provision prohibiting the discriminatory discharge of employees).[5] Needless to say, the sustainability of federal jurisdiction over this complaint would be dependent on the determination of this concern. Though it seems from the face of these pleadings that Lavin would have an exceedingly

[4] In footnote 1 of their motion to dismiss the defendants concede that Lavin has taken steps to exhaust his administrative remedies vis-à-vis Unum, though not with respect to the individual defendants.

[5] With respect to Lavin's Count II claim against Parechanian and his Count III claim against Merrill, the defendants generously respond by assuming that Lavin intends a claim under the Maine Human Rights Act, though the complaint mentions only the ADA. This decision does not bind the defendants to that pleading concession.

difficult time sustaining federal jurisdiction on a theory that his condition would qualify as a disability under the ADA, see, e.g., Soileau v. Guilfords of Me., Inc., 105 F.3d 2 (1st Cir. 1997), I do not recommend a sua sponte dismissal of this claim against Unum.

Conclusion

Based upon the foregoing, I recommend that the court **GRANT** the motion to dismiss as to defendants Trezza, Parechanian, and Merrill. I recommend that the Court allow Lavin to proceed on Count II as against Unum. I also recommend that the court limit Count IV against Unum to a claim of defamation not made in good faith and not subject to a conditional privilege.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Margaret J. Kravchuk
U.S. Magistrate Judge

January 15, 2002

MAGREC STNDRD

U.S. District Court

District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 01-CV-135

LAVIN v. TREZZA, et al Filed: 05/21/01

Assigned to: JUDGE GENE CARTER

Demand: $0,000 Nature of Suit: 442

Lead Docket: None Jurisdiction: Federal Question

Dkt # in Cumberland County : is 01-CC-224

Cause: 28:1441 Notice of Removal

JOHN E LAVIN JOHN E LAVIN

plaintiff [COR LD NTC pro] [PRO SE]

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(207)-797-7008

v.

PATRICIA TREZZA MARGARET C. LEPAGE

defendant 773-6411

[COR LD NTC]

PIERCE, ATWOOD, ONE MONUMENT SQUARE

PORTLAND, ME 04101-1110 791-1100

LISA PARECHANIAN MARGARET C. LEPAGE

defendant (See above)

[COR LD NTC]

ROBYN MERRILL MARGARET C. LEPAGE

defendant (See above)

[COR LD]

UNUMPROVIDENT CORP MARGARET C. LEPAGE

dba (See above)

Unum Life Insurance Company of [COR LD]

America

defendant